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Supreme Court, U.S.
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In The

Supreme Court of the United States

FPL ENERGY MAINE HYDRO LLC,

Petitioner,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari
To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state certifying agency's authority to issue a binding water quality certification decision under Section 401 of the Clean Water Act limited to the one-year period following the certification request?

PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the appeal before the Maine Supreme Judicial Court were Petitioner FPL Energy Maine Hydro LLC, Respondent Maine Department of Environmental Protection, and Intervenors Maine Rivers, Trout Unlimited, Appalachian Mountain Club, and Natural Resources Council of Maine.

FPL Energy Maine Hydro LLC states that its parents, subsidiaries, and affiliates that have issued shares or debt securities to the public are:

FPL Group, Inc.
Florida Power & Light Company
FPL Group Capital Inc

FPL Energy Maine Hydro LLC is a Delaware limited liability company whose parent is White Pine Hydro, LLC, whose parent is White Pine Hydro Holdings, LLC, whose parent is White Pine Hydro Portfolio, LLC, whose parent is White Pine Hydro Investments, LLC, whose parent is FPL Energy Maine, Inc., whose parent is FPL Energy, LLC, whose parent is FPL Group Capital Inc, whose parent is FPL Group, Inc., which is a publicly traded company located at 700 Universe Boulevard, Juno Beach, Florida, 33408.

FPL Group, Inc. indirectly owns 10% or more of FPL Energy Maine Hydro LLC's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES BELOW AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION	2
STATEMENT OF THE CASE	3
I. Section 401 and State Water Quality Certification	3
II. FPL Energy's Request for Water Quality Certification and DEP's Agency Action	4
III. Judicial Review by the Maine Courts	6
A. The Superior Court	6
B. The Supreme Judicial Court	7
REASONS FOR GRANTING THE WRIT	8
I. Background: The Prominence of State Water Quality Certification in the Federal Licensing Proceedings and the Significance of the One-Year Deadline for State Action	9

TABLE OF CONTENTS – Continued

Page

II. Courts Outside of Maine Recognize that Section 401 Requires the Certifying Agency to Take Final Action Within One Year After the Request for Certification 16

A. The *Puerto Rico Sun Oil* Decision 17

1. Case Background: The Certifying Agency Issued Final Certification More Than One Year After the Request for Certification 17

2. The Court's Analysis: The Certifying Agency Waived its Certification Right by Failing to Issue Final Certification Within One Year 18

B. The *Airport Communities Coalition* Decision 20

1. Case Background: The Timely Granted Certification was Amended by an Agency Appeals Board After the Expiration of the One-year Deadline 20

2. The Court's Analysis: The Action of the Agency Appeals Board After the One-year Deadline was Not Binding on the Federal Licensing Agency 22

III. The SJC's Decision is Inconsistent with Existing Circuit Court Case Law and Sets a Dangerous Precedent 25

TABLE OF CONTENTS – Continued

Page

A. The SJC Departed from Existing Case Law that Establishes that Action After the One-year Deadline is Inconsistent with Section 401 28

B. Even if Section 401 Does Not Require Final Agency Action Within One Year, Action Taken Within One Year Cannot Be Disturbed 31

C. The SJC's Interpretation of Section 401 Renders the Waiver Provision Meaningless, Destroying the Federal/State Balance it was Intended to Ensure 33

CONCLUSION 34

APPENDIX

Maine Supreme Judicial Court Decision – *FPL Energy Maine Hydro LLC v. Department of Environmental Protection*, 2007 ME 97, 926 A.2d 1197 (Me. 2007) A-1

Maine Superior Court Order – *FPL Energy Maine Hydro, LLC v. Department of Environmental Protection*, No. AP-04-50 (Me. Super. Ct., Ken. Cty., May 25, 2006) A-30

Statutory Provision Involved A-31

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) ..... *passim*

American Rivers, Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997) 10, 32

California v. FERC, 495 U.S. 490 (1990) 12, 13

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946) 11, 12, 13

Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency, 8 F.3d 73 (1st Cir. 1993) ..... *passim*

U.S. v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) 8

STATE CASES

de Rham v. Diamond, 295 N.E.2d 763 (N.Y. 1973) 13

FPL Energy Maine Hydro, LLC v. Dep't of Envtl. Prot., No. AP-04-50 (Me. Super. Ct., Ken. Cty., May 25, 2006) 1, 6, 7

FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot., 2007 ME 97, 926 A.2d 1197 (Me. 2007) ..... *passim*

Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation, 624 N.E.2d 146 (N.Y. 1993) 12

Power Auth. of New York v. Williams, 357 N.E.2d 726 (N.Y. 1984) 12

TABLE OF AUTHORITIES – Continued

Page

S.D. Warren Co. v. Bd. of Envtl. Prot., 2005 ME 27, 868 A.2d 210 (Me. 2005) 27

S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) 27

S.D. Warren Co. v. Me. Dep't of Envtl. Prot., No. AP-03-70, 2004 Me. Super. LEXIS 115 (Me. Super. Ct., Cum. Cty., May 4, 2004) 27

FEDERAL STATUTES

16 U.S.C. §§ 791a *et seq.* 11

16 U.S.C. § 803(a) 12

16 U.S.C. § 821 12

28 U.S.C. § 1257(a) 2

33 U.S.C. § 403 10

33 U.S.C. §§ 1251 *et seq.* 2

33 U.S.C. § 1341 ..... *passim*

33 U.S.C. § 1342 ..... 10, 17

33 U.S.C. § 1344 10

33 U.S.C. § 1362(3) 17

STATE STATUTES

ME. REV. STAT. ANN. tit. 5, § 11001(1) 2

ME. REV. STAT. ANN. tit. 5, § 11008(1) 2

ME. REV. STAT. ANN. tit. 38, § 341-A(2) 4

TABLE OF AUTHORITIES – Continued

Page

RULES

S. CT. R. 10(b) 9

S. CT. R. 10(c) 9

LEGISLATIVE HISTORY

115 CONG. REC. (April 16, 1969) 14, 15, 30

H.R. 4148, 91st Cong. § 14(b) (1969) 14

H.R. CONF. REP. NO. 91-940 (1970) 16

H.R. REP. NO. 66-61 (1919) 12

S. 7, 91st Cong. § 14(b) (1969) 14

AGENCY DOCUMENTS

Central Vermont Public Service Co., 113 FERC ¶ 61,167 (2005) 26, 27

FPL Energy Maine Hydro LLC, 108 FERC ¶ 61,261 (2004) 26

FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104 (2005) 26

PETITION FOR WRIT OF CERTIORARI

Clean Water Act ("CWA") Section 401, 33 U.S.C. § 1341, provides that a state wishing to issue (or deny) a water quality certification must act on a request for certification within a reasonable time, which shall not exceed one year. FPL Energy Maine Hydro LLC ("FPL Energy") petitions for a writ of certiorari to review the decision of the Maine Supreme Judicial Court ("SJC"), which ruled that the State of Maine, through its Department of Environmental Protection ("DEP"), acted in accordance with Section 401 even though DEP failed to take final action to deny FPL Energy's request for water quality certification until more than one year after the request.

OPINIONS BELOW

DEP issued two orders associated with FPL Energy's request for water quality certification. Both are unreported. First, by an order dated November 13, 2003, the Commissioner of Environmental Protection (the "Commissioner") issued the requested certification. By subsequent order, dated July 15, 2004, the Board of Environmental Protection (the "Board") overturned the Commissioner's decision and denied FPL Energy's request without prejudice. The Maine Superior Court's decision, which upheld the Board's order and found that the Board's action was consistent with CWA Section 401, *FPL Energy Maine*

Hydro, LLC v. Department of Environmental Protection, No. AP-04-50 (Me. Super. Ct., Ken. Cty., May 25, 2006), is unreported but is reprinted in the Appendix, beginning at A-30. The SJC's opinion upholding the Superior Court's decision, entered July 26, 2007, is reported at *FPL Energy Maine Hydro LLC v. Department of Environmental Protection*, 2007 ME 97, 926 A.2d 1197 (Me. 2007), and is reprinted in the Appendix, beginning at A-1.

JURISDICTION

The SJC exercised jurisdiction over FPL Energy's appeal pursuant to ME. REV. STAT. ANN. tit. 5, §§ 11001(1) and 11008(1). The order of the SJC was entered on July 26, 2007. This Court's jurisdiction rests upon 28 U.S.C. § 1257(a).

STATUTORY PROVISION

At issue in this case is the Federal Clean Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (the "Clean Water Act" or "CWA"), in particular Section 401, 33 U.S.C. § 1341. The relevant portion of Section 401 is reprinted in the Appendix, beginning at A-52.

STATEMENT OF THE CASE

I. Section 401 and State Water Quality Certification

Clean Water Act Section 401 requires an applicant for a federal license authorizing any activity that may result in any discharge to navigable waters to comply with state water quality standards. Certification of compliance must be obtained from the state in which the discharge will originate. Until such certification is granted or waived, the federal licensing agency is prohibited from issuing a license. Further, any conditions attached to state water quality certification must become conditions of the federal license. Appendix ("App.") A-52 through A-54.

Section 401 provides for waiver of states' certification rights, as follows:

> If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal applications.

App. A-53.

In Maine, the State's authority to issue or deny water quality certifications rests with DEP. App. A-9. DEP consists of the Commissioner and the Board: "The department shall consist of the Board of Environmental Protection . . . and of a Commissioner of

Environmental Protection." ME. REV. STAT. ANN. tit. 38, § 341-A(2); App. A-9.

II. FPL Energy's Request for Water Quality Certification and DEP's Agency Action

FPL Energy owns and operates the Flagstaff Storage Project (the "Project"), which consists of a dam (the Long Falls Dam), a reservoir (Flagstaff Lake), and appurtenant facilities. App. A-2. Operation of the Project requires a license issued by the Federal Energy Regulatory Commission ("FERC"). App. A-2. Prior to the December 31, 1997 expiration of the FERC license for the Project, the then owner, Central Maine Power Company ("CMP"),[1] commenced license renewal activities, including filing the required application with FERC and a request for Section 401 water quality certification with the State. App. A-2 through A-3. CMP submitted its first request to the State for water quality certification in 1995 by filing with the Maine Land Use Regulation Commission. DEP Record Item "R." 76. In 1996, CMP re-filed its request, which then was transferred to DEP as a result of a reshuffling of certification authority among State agencies.[2] R. 102; *see also* App. A-3.

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[1] FPL Energy acquired the Project from CMP in 1999. App. A-3.

[2] In 1996, the Governor of Maine, by Executive Order, reallocated jurisdiction among State agencies for water quality certifications. R. 262.

Because a state waives certification if it does not act on an application within one year (App. A-3), at DEP's request, CMP, and subsequently FPL Energy, withdrew and re-filed the application for certification each year from 1997 through 2002. App. A-3. FPL Energy filed its final request on November 15, 2002. App. A-3. The Commissioner granted water quality certification (the "Certification") 364 days later, on November 14, 2003. App. A-3.

Maine Rivers, Trout Unlimited, the Appalachian Mountain Club, and the Natural Resources Council of Maine (collectively, the "non-governmental organizations," or "NGOs") sought additional DEP consideration by appealing the Certification to the Board. App. A-4. Although the Project itself does not discharge anything into the water (*see* App. A-27 through A-28 (noting that this point was not contested)), the NGOs argued that the way FPL Energy would draw down the water level of the Flagstaff Lake impoundment would not comply with EPA-approved state water quality standards for protection of aquatic life. *See* App. A-4.

To ensure that operation of the manmade lake complied with water quality standards, earlier in 2003 the Maine Legislature had adopted a resolve stating that Flagstaff Lake should be compared to a similar impoundment. App. A-20 through A-21. Because prior to the Legislature's 2003 resolve the DEP staff had compared manmade impoundments to natural lakes, and because EPA did not approve the Legislature's 2003 resolve, the NGOs argued that it

was improper for the Commissioner to issue a certification based on the impoundment-to-impoundment comparison called for by the Maine Legislature. The Board agreed with the NGOs. *See* App. A-4 through A-5.

On July 15, 2004, nine years after the filing of the first request for certification with the State and more than one and one-half years after FPL Energy filed the final certification request with DEP, the Board reversed the Commissioner's decision and denied FPL Energy's request for water quality certification, without prejudice. App. A-4.

The DEP's denial of the certification reflected the Board's objection to the Commissioner's use of the legislatively mandated impoundment-to-impoundment comparison without first obtaining EPA's approval. App. A-5.

III. Judicial Review by the Maine Courts

A. The Superior Court

On August 9, 2004, FPL Energy timely filed with the Maine Superior Court a petition for review of the DEP's action. App. A-6, A-33. Among the questions raised by FPL Energy was whether the agency's action taken more than one year after FPL Energy's request for water quality certification was consistent with the CWA Section 401 requirement that the State certifying agency must act on a certification request within one year. FPL Energy argued that DEP

waived its certification rights by failing to take final action within the one-year deadline, or, alternatively, that only the agency action taken within the one-year deadline – the Commissioner's order – was effective pursuant to Section 401. App. A-39 through A-40.

Ultimately, the Superior Court determined that final agency action taken after the one-year deadline is consistent with the requirements of Section 401. App. A-49.

B. The Supreme Judicial Court

FPL Energy appealed the Superior Court decision to the Maine SJC. Among the issues presented on appeal, FPL Energy questioned the Superior Court's interpretation of Section 401. The SJC observed: "Since the Board's decision was issued more than one year after the application was filed, FPL argues that the Department waived certification or, in the alternative, that the Board's actions after the one-year deadline are ineffective." App. A-9.

Noting that Section 401 "does not define 'act on'," the SJC found it "unclear from the plain meaning of the statute whether the requirement is one of *some action* or *final action*." App. A-10 (emphasis added). The SJC ultimately determined that the former – some action – is all that is required by Section 401. App. A-13. The SJC rejected FPL Energy's alternative argument, stating that "we conclude that the Board complied with the [Section 401] requirement that it act on the application within one year." App. A-10. By

finding that DEP acted in accordance with Section 401, the SJC's decision is that DEP's final action – the denial – is binding on the federal licensing agency, FERC.

REASONS FOR GRANTING THE WRIT

Section 401 of the Clean Water Act ensures that states play a central role in protecting their water resources. Any activity that may result in a discharge into navigable waters and that requires a federal license or permit first must be subject to state water quality certification. Therefore, in what otherwise is a federal licensing process, states have veto authority if they determine that the proposed activity will violate water quality standards; the denial of a request for certification means denial of the federal license. *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) ("The legislative history of section 401 of the Act ('Certification') confirms that Congress intended to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality.").

The SJC's decision means there is no limit on the time within which states must exercise their veto, contrary to the express provision of the CWA. Under the SJC's reasoning, a state can toll the one-year deadline in Section 401 simply by taking *some action* within the year following a request for water quality certification, while delaying final action until some

future date, or perhaps never taking action at all. Thus, in addition to being able to veto a federal permit application on the grounds that the proposed activity would result in a violation of water quality standards – the purpose behind Section 401 – the SJC decision opens the door for states to passively kill projects, not on water quality grounds, but through simple delay or incomplete action.

The SJC's decision sets a dangerous precedent and calls for an interpretation of Section 401 that stands in stark contrast to that applied by both the U.S. Court of Appeals for the First Circuit and by a U.S. District Court in the Ninth Circuit. To resolve the conflict between the Maine SJC and these federal courts, and to resolve this important issue of federal/state jurisdiction in federal permitting proceedings, FPL Energy respectfully requests that the Court grant this petition. S. CT. R. 10(b)-(c).

I. Background: The Prominence of State Water Quality Certification in the Federal Licensing Proceedings and the Significance of the One-Year Deadline for State Action

Numerous activities in and around water bodies, whether the water body is a stream, river, pond, lake, ocean, or wetland, require federal licenses or permits and otherwise trigger the need for state water quality

certification.[3] The result is that each state plays an important role in protecting its waters. As noted above, Section 401 prohibits any federal agency from issuing a license for an activity that may result in any discharge until the state has certified the activity or waived certification. App. A-53. And any conditions imposed on the activity in the state water quality certification must be included as conditions in the federal license. App. A-53 through A-54; *American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997) (stating that the federal licensing agency "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of Section(s) 401").

While Section 401 provides states considerable power in the federal permitting process through their ability to impose conditions on projects or to veto them altogether on water quality grounds, it does not

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[3] Clean Water Act Section 402, 33 U.S.C. § 1342, requires a permit for any activity that may result in a discharge of a pollutant to navigable waters. The U.S. Environmental Protection Agency oversees that permit program. CWA Section 404, 33 U.S.C. § 1344, requires a permit for the discharge of dredged or fill material into navigable waters. The U.S. Army Corps of Engineers oversees that permitting program, which plays a central role in the protection of wetlands. Under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, the Army Corps must issue permits for structures with the potential to impede navigation. All of these permits are other examples of the type of federal permits (in addition to FERC hydropower licenses) that trigger the need for state water quality certification under CWA Section 401.

provide states with unilateral authority to dictate the timing of the federal process or, potentially, to allow a project to die on the vine by failing to take final action within a reasonable period of time.

Federal licensing programs generally reflect the belief by Congress that, with regard to the licensed activity, the public interest is best served through a single, uniform regulatory system. This is the case with the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a *et seq.*, which grants FERC primary authority to license hydropower projects and which was the "outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180 (1946).[4] The FPA:

> provide[s] "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. . . . The problems are national, rather than local; they transcend State lines and cannot be handled adequately except by or in conjunction with national agencies."

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[4] The Federal Power Commission ("FPC") was the predecessor agency to FERC.

Id. at 180 n.23 (quoting statement of David F. Houston, Secretary of Agriculture, H.R. REP. NO. 66-61, at 5 (1919)).

While "the FPA establishes a broad and paramount federal regulatory role" in the licensing of hydropower projects and the management of national hydropower resources, *California v. FERC*, 495 U.S. 490, 499 (1990), at the same time the FPA is a "highly complex and long-enduring regulatory regime" that also respects states' interests in protecting their water resources. *Id.* at 500. For example, Section 27 of the FPA, 16 U.S.C. § 821, reserves to the states authority over "the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses," while Section 10(a), 16 U.S.C. § 803(a), provides an avenue for states to raise concerns about a project's impact on fish and wildlife and authorizes FERC to address those concerns through the adoption of state-proposed conditions.

Section 401 of the CWA provides an additional role for states in the licensing of hydropower projects, but it is not intended to disrupt the balance of federal and state authority otherwise struck in the FPA. *Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993) (FPA establishes comprehensive scheme for regulation of hydropower projects, and a state's role under CWA Section 401 is limited to reviewing whether the projects meet water quality standards); *Power Auth. of New York v. Williams*, 357 N.E.2d 726, 730 (N.Y. 1984) (certifying agency is limited to

determining whether applicable water quality standards are met and is not authorized to engage in a comprehensive environmental review and balancing of interests); *de Rham v. Diamond*, 295 N.E.2d 763, 767-78 (N.Y. 1973) (certifying agency has authority only to determine whether there is reasonable assurance that the activity will not violate water quality standards).

The balance of federal/state authority achieved by federal licensing programs is delicate, with the potential for natural tension between the federal licensing agency and the state. Time has proven this tension exists under the FPA. For example, *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), and *California v. FERC*, 495 U.S. 490 (1990), both involved disagreements between FERC and the state in which a project was located over the scope of the role each was to play in the permitting of those hydropower projects.

Recognizing this tension, and aware of concerns by those subject to federal permitting that states could use the certification process to indefinitely delay or passively kill projects, Congress sought to ensure that the certification process would not unduly interfere with federal permitting programs, such as the one created under the FPA, by requiring that states act on a request for certification within a reasonable period of time, not to exceed one year.

The legislative history of Section 401 makes this clear. When the language that ultimately became

Section 401 first was proposed as part of the Water Quality Improvement Act of 1969, neither the initial Senate bill nor the House bill amending the CWA contained a provision requiring the certifying state or appropriate agency to act on a request for certification within a reasonable period of time. S. 7, 91st Cong. § 14(b) (1969); H.R. 4148, 91st Cong. § 14(b) (1969). That language came later, in an amendment to the House bill offered by Representative Edmondson. 115 CONG. REC. 9264 (April 16, 1969). The amendment provided that the certification requirements shall be waived if the federal licensing agency determined that the certifying entity failed to certify or refused to certify within a reasonable period of time.[5] *Id.* Language specifying that a reasonable period of time could not exceed one year was not included in Rep. Edmondson's amendment; the federal licensing agency had discretion to determine what was reasonable.

The purpose of the amendment was to avoid delaying the certification process. As Rep. Edmondson explained, while states are not pressured by the

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[5] The amendment provided:

> If an affected State or interstate water pollution control agency or the Secretary, as the case may be, fails to act to certify or refuse to certify within a reasonable period of time as determined by the licensing or permitting agency after notification of such application, the certification requirements of this subsection shall be waived with respect to such State, agency, or Secretary, as the case may be, with respect to such application.

115 CONG. REC. 9264.

amendment to grant certification, they are "put in the position with this amendment to do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" within the period of time deemed reasonable by the federal licensing agency. *Id.* "The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification required as to that State." *Id.* (statement by Rep. Edmondson); *see also id.* at 9265 (Rep. Holifield speaking in favor of the amendment: "[T]his amendment guards against a situation where the water pollution control authority in the State in which the activity is to be located, or possibly in some other state, simply sits on its hands and does nothing. . . . [I]t has to take affirmative action to consider the matter and to decide to withhold the certificate if it wants to defeat a proposed project.").

The House bill, including Rep. Edmondson's amendment, formed the basis for the legislation that emerged from conference. A notable difference, however, is that the discretion of the federal licensing agency to determine the length of time that qualifies as a reasonable period within which the certifying state must grant or deny certification was limited; Congress determined that in no instance could action taken after one year be "reasonable." The Conference Report made this clear:

> In order to insure that sheer inactivity by the State . . . will not frustrate the Federal application, a requirement, similar to that contained in the House bill is contained in the conference substitute that if within a

> reasonable period, which cannot exceed one year, after it has received a request to certify, the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived.

H.R. CONF. REP. NO. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2741.

Thus, while Section 401 ensures that states play a central role in the federal permitting of projects with the potential to impact water quality, Section 401 also seeks to ensure that state certification is focused on the preservation of water quality and does not become a means for states to disrupt federal permitting programs or unduly delay federal permit applications. This balance is struck by requiring states to act on a request for water quality certification – either by granting or denying the certification – within one year of the request. The SJC's decision in this case destroys that balance.

II. Courts Outside of Maine Recognize that Section 401 Requires the Certifying Agency to Take Final Action Within One Year After the Request for Certification.

The U.S. Court of Appeals for the First Circuit and a U.S. District Court in the Ninth Circuit both have recognized the significance of the one-year deadline in Section 401 and have found that agency action taken beyond that deadline is inconsistent with that section.

A. The *Puerto Rico Sun Oil* Decision

1. Case Background: The Certifying Agency Issued Final Certification More Than One Year After the Request for Certification.

In *Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency*, 8 F.3d 73 (1st Cir. 1993), the First Circuit addressed Sun Oil's appeal of a federal pollutant discharge license, issued by the U.S. Environmental Protection Agency ("EPA"), that incorporated the conditions of a Section 401 water quality certification issued by the Puerto Rico Environmental Quality Board ("EQB").[6] The court found that EPA acted arbitrarily and capriciously in the manner in which it incorporated EQB's water quality certification into the final waste discharge license. In the course of its analysis, the First Circuit addressed a procedural claim by Sun Oil that, because EQB's certification was issued beyond the Section 401 one-year deadline, "Puerto Rico's final certification came too late and therefore could not furnish the basis for EPA's own final permit." *Id.* at 79.

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[6] CWA Section 402, 33 U.S.C. § 1342, requires the licensing of all activities that may result in the discharge to navigable water of a pollutant from a point source. All activities requiring a discharge license under Section 402 also must obtain state certification under Section 401. For the purpose of the CWA, Puerto Rico is treated as a state. *Puerto Rico Sun Oil*, 8 F.3d. at 74 (referencing 33 U.S.C. § 1362(3)).

Sun Oil had submitted its application for a discharge license to EPA on May 27, 1988. On October 31, 1988, EPA forwarded the application to EQB and requested water quality certification. EQB issued a draft certification in January 1989, within one year of the October 31, 1988 request. EQB did not issue final certification, however, until July 24, 1990, more than one and one-half years after certification had been requested by EPA. *Id.* at 74-76 (setting out the timeline).

2. The Court's Analysis: The Certifying Agency Waived its Certification Right by Failing to Issue Final Certification Within One Year.

The First Circuit conducted a two-step analysis in its review of Sun Oil's claim. First, the court asked whether EQB acted in accordance with Section 401's one-year deadline even though EQB did not take final action within the year following the request for certification. This is the same issue presented in this Petition.

The First Circuit found that EQB's action was untimely and inconsistent with the deadline in Section 401. The court noted: "EPA was entirely free, once Puerto Rico had ignored the clear deadlines for a *final certification*, to treat the Commonwealth as an interested bystander with no further veto authority." *Id.* at 78 (emphasis added). The court added: "Under the statute . . . , the price of failing to meet

the deadlines is that the state agency waives its right to dictate permit terms that go beyond what [the federal licensing agency] would do on its own." *Id.* at 79.

In short, according to the First Circuit, *final* agency action is what is required by Section 401 within the one-year certification deadline. Not only is this evident from the language quoted above, but also from the fact that EQB had issued a draft permit within the one-year deadline – a fact that clearly evinces "some action" – and the court found that action insufficient to meet the Section 401 deadline. Also evident from the court's decision is that any action taken by the certifying agency after the one-year period is not binding on the federal licensing agency.

The First Circuit then proceeded, in the second step of its two-step analysis, to address whether, consistent with Section 401, the federal licensing agency may exercise some level of discretion and accept certification conditions issued after the one-year deadline. The court determined that, while a certifying agency waives its certification right by failing to take final action within one year after a request for certification – meaning that after the one year period lapses the federal agency is free to treat the certifying agency as a bystander – the federal licensing agency (in that case EPA) may, in some situations, choose to accept certification conditions issued after the one-year deadline. *Id.* at 79-80.

Because the Board decision here did not seek to impose conditions on the federal agency's license, but instead purported to deny the certification entirely, this second step in the *Puerto Rico Sun Oil* analysis is not directly relevant here. Rather, this petition focuses on the first step in the *Puerto Rico Sun Oil* analysis, and the authority of a state certifying agency to issue a binding water quality certification decision after the one-year deadline. As explained more fully below, the SJC's decision here directly conflicts with that portion of the First Circuit's decision in *Puerto Rico Sun Oil*.

B. The *Airport Communities Coalition* Decision

1. Case Background: The Timely Granted Certification was Amended by an Agency Appeals Board After the Expiration of the One-year Deadline.

Airport Communities Coalition v. Graves, 280 F. Supp. 2d 1207 (W.D. Wash. 2003) ("*A.C.C.*"), involved a challenge brought by a group of cities and other municipal government bodies (the "Coalition") to a federal dredge and fill permit issued by the U.S. Army Corps of Engineers (the "Corps"). The Corps permit authorized the filling of wetlands in order to expand the Seattle-Tacoma International Airport; state water quality certification was required prior to the issuance of the Corps permit. The Coalition claimed, among other things, that the Corps's decision to issue the permit was arbitrary and capricious

because "the Corps failed to incorporate into the permit various conditions placed on the project by the state Pollution Control Hearing Board ('PCHB')" as part of the state water quality certification process. *A.C.C.*, 280 F. Supp. 2d at 1214.

In *A.C.C.*, the Corps had published final public notice of the dredge and fill application on January 17, 2001. The court viewed the date of that final notice as the start of the one-year period within which state certification was required by Section 401. The Washington State Department of Ecology ("WDE") issued its certification on September 21, 2001, well within the one-year time period. The Coalition then appealed WDE's action to PCHB, an independent administrative review board that is part of a separate state agency that hears appeals of orders and decisions issued by WDE. *Id.* at 1214 (showing the timeline).

On August 12, 2002, more than one year after the initial request for certification, PCHB affirmed the certification issued by WDE, but also added 16 new conditions. When it issued the dredge and fill permit, the Corps chose to incorporate only seven of the 16 conditions. *Id.* The Coalition's challenge followed.

2. The Court's Analysis: The Action of the Agency Appeals Board After the One-year Deadline was Not Binding on the Federal Licensing Agency.

The *A.C.C.* court, applying the First Circuit's reasoning in *Puerto Rico Sun Oil*, rejected the

Coalition's claim that the Corps erred by not including all of the 16 additional conditions in the final federal license. *Id.* at 1217 (citing *Puerto Rico Sun Oil* in support of its conclusion). The court found that the disputed conditions were issued by PCHB more than one year after the request for certification (*id.* at 1214), and held that only certification conditions issued within one year after the request for certification meet the waiver deadline established in Section 401. *Id.* at 1217. Further, the court determined that administrative appeals of state certifications, heard at the agency level, must be completed within one year of the request for certification to be consistent with the Section 401 deadline. *Id.*

Central to the Coalition's claim was its interpretation of Section 401(d). The Coalition argued that, pursuant to that provision, all conditions of a state water quality certification must be made part of the final federal permit. *Id.* at 1215. Section 401(d) provides, in relevant part:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, . . . and shall become a condition of any Federal license or permit subject to the provisions of this section.

App. A-53 through A-54. The *A.C.C.* court, however, found that the Coalition's interpretation of Section

401(d) "renders the time bar in Section 401(a) superfluous." *A.C.C.*, 280 F. Supp. 2d at 1215.

The court reasoned as follows: "If the time bar is to mean anything, . . . it must mean that the issuance of state certification conditions outside the one-year time period must be treated differently than the issuance of such conditions occurring within that period." *Id.* The difference between certifications issued before and after the one-year deadline, the court concluded, is that only the former are consistent with the requirements of Section 401, thus requiring incorporation of the attached conditions into the federal permit pursuant to Section 401(d). After the one-year certification deadline passes, states waive their certification rights under Section 401. As a result, while not barred outright by Section 401, certification conditions issued after that one-year deadline have no binding effect on the federal permitting agency. *Id.* at 1217 ("Accordingly, the court holds that Section 401 requires that the Corps incorporate only those state certification conditions issued within a year of issuing the notice of the request for certification.").

Notably, in the course of reaching this conclusion the court addressed whether Section 401 could be read as merely requiring some action, as opposed to final action, within the one-year period following a request for certification. The court also considered whether agency-level administrative appeals must be completed within that one-year period. The court rejected the notion that some action – or, as the

A.C.C. court termed it, "some process" – is all that is needed to satisfy the Section 401 deadline. *Id.* at 1215. The court explained:

> [T]he time limit was inserted in order to avoid a state from interminably blocking a federal permit by stalling the Section 401 certification. Whether a state begins to act but does not complete the issuance of a certification or whether the state entirely fails to act at all, the legislative history of Section 401 makes clear that either of those two situations was unacceptable to Congress because both result in delays in issuing Federal permits.

Id. at 1216.

The court determined that by requiring state certification to be completed within one year after the request for certification, Section 401 established that agency-level administrative appeals, too, must be concluded within that period to be consistent with Section 401. The court indicated that states were free to structure their certification programs as they saw fit, and if a state was concerned about waiving its certification authority by failing to take final action within the one-year deadline, the state could modify its certification program accordingly. *See id.* at 1217.

III. The SJC's Decision is Inconsistent with Existing Circuit Court Case Law and Sets a Dangerous Precedent.

In its *FPL Energy* decision, at issue here, the SJC concluded that so long as *some action* is taken, provided that action is taken within one year after the request for certification, the requirement in Section 401 that a state "act on" a request for certification "within a reasonable period of time (which shall not exceed one year)," has been satisfied. The SJC went on to reason that, once satisfied, the waiver provision contained in Section 401 ceases to apply and all subsequent action taken by the state, even if taken after one year, must be treated as consistent with Section 401. Thus, according to the SJC, Section 401 does not impose any time constraints on a certifying agency's final action, but uses the risk of waiver to motivate states only to commence the certification process by taking some initial action within one year of the certification request. App. A-8 through A-13.

Applying this reasoning to the facts before it, the SJC concluded that, although the Board did not issue its denial of certification until more than one year after FPL Energy's final request, "the Board complied with the [Section 401] requirement that it act on the application within one year." App. A-10. The import of this conclusion is that a state certifying agency – despite finally acting more than one year after the request for certification – does not waive its right to certify or deny certification for projects requiring a federal license, notwithstanding

the prescribed one-year deadline in Section 401 to "act on" the certification request. Thus, according to the SJC, the state agency's final action, here DEP's denial of certification in the form of a Board order, is *binding* on the federal licensing agency, here FERC.[7]

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[7] FERC has adopted a position similar to that of the SJC, concluding that DEP did not waive certification by failing to take final action within one year. *FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261 at ¶ 7 (2004), *reh'g denied*, 111 FERC ¶ 61,104 (2005). FERC initially reasoned that nothing in the language of Section 401 expressly calls for the state to resolve all appeals within one year, and therefore that intra-agency appeals do not need to meet the one-year deadline, even if completion of such appeals necessarily precedes final agency action. *Id.* On rehearing, FERC backed away from its prior reasoning, stating instead that "we see nothing in section 401 that gives the Commission any authority to determine the finality of state-issued certification decisions. Issues concerning the validity of state actions under section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters." *FPL Energy Maine Hydro LLC*, 111 FERC ¶ 61,104 at ¶ 8 (2005). In addition to the flaws in FERC's initial reasoning (*see infra* note 9), the implication that a state certifying agency can toll the one-year requirement contained in Section 401 is directly at odds with other FERC decisions. For example, in *Central Vermont Public Service Co.*, 113 FERC ¶ 61,167 at ¶¶ 15-16 (2005), Vermont's certifying agency took issue with what it thought was an overly rigid definition of the term "act" in Section 401 as requiring a denial or grant of certification within the one-year deadline. The Vermont agency argued that such an interpretation was inconsistent with FERC's practice of issuing "'tolling' orders" to stay other deadlines. *Id.* at ¶ 16 n.15. FERC rejected the agency's claim, reasoning – contrary to FERC's initial reasoning in its 2004 *FPL Energy* decision – that Section 401 does not allow states to toll or extend the certification deadline past one year.

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The SJC's *FPL Energy* decision conflicts with existing case law. This departure appears to be the result of the SJC brushing aside established precedent in an effort to achieve the desired result – protecting the State's cumbersome certification process so that neither existing state procedural requirements, nor the behavior of the certifying agency, needs to be modified to comport with federal law.[8] This ends-driven approach guts the Section 401 one-year deadline provision. The SJC's reading of Section 401 allows the very state behavior – inaction and delay resulting in undue state interference in federal licensing actions – that Congress sought to prevent.

Id. Granting this petition would help resolve the confusion at FERC as well as in the courts.

[8] Although in this case DEP did not take final agency action within the one-year period established in Section 401, Maine's existing water quality certification process does allow sufficient time for the Commissioner to issue (or deny) a certification and for that certification decision to be fully reviewed by the Board within one year. *See S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 3, 868 A.2d 210, 213 (Me. 2005), *aff'd on alternate grounds*, 126 S. Ct. 1843 (2006) (an example of DEP taking final agency action on a request for certification, in the form of a Board order following appeal of the Commissioner's grant of certification, within one year); *S.D. Warren Co. v. Me. Dep't of Envtl. Prot.*, No. AP-03-70, 2004 Me. Super. LEXIS 115, at *2 (Me. Super. Ct., Cum. Cty., May 4, 2004) (noting that the request for certification was filed on December 20, 2002 and that DEP took final action in October 2003). In the present case, however, the Commissioner did not issue certification until the 364th day, making it impossible for the Board to complete its review, and thus for DEP to take final agency action, within the statutorily required, one-year period.

It is to resolve this conflict among the courts, and settle this important issue of federal/state jurisdiction in federal permitting processes, that FPL Energy asks this Court to grant this petition.

A. The SJC Departed from Existing Case Law that Establishes that Action After the One-year Deadline is Inconsistent with Section 401.

The SJC's opinion is directly at odds with First Circuit's decision in *Puerto Rico Sun Oil* and the similar reasoning applied in *A.C.C.* While in both of those cases the court ultimately found that the federal licensing agency possessed some amount of discretion to accept certification conditions issued after the one-year deadline, that conclusion was predicated on the initial determination – contrary to the SJC's determination here – that by failing to act finally within the one-year deadline in Section 401 states waive their certification right. In both cases, only because the state certifying agency had waived its right provided for in Section 401 was it necessary for the court to consider whether the federal licensing agencies possessed some level of discretion to accept late-filed certification conditions. Had the states not waived their certification right, the issue concerning the level of discretion possessed by federal licensing agencies would not have been presented, because, absent waiver, state action on a request for certification must be respected by the federal licensing agency and any conditions of the certification must be made

part of the final federal license, and a denial of certification bars issuance of the federal license altogether.

The SJC's opinion appears to have been the product of a desire to preserve Maine's water quality certification process in the face of federal law requirements. For example, the SJC's claim that the issue presented by FPL Energy in its appeal is distinct from the issue addressed in *A.C.C.*, and therefore from the issue addressed in *Puerto Rico Sun Oil*, has no basis. The court appears either to have chosen to ignore or to have failed to recognize that the *A.C.C.* court, in finding that the Corps did not have to adopt all the PCHB's additional conditions, first determined that PCHB's action came after Section 401's one-year deadline and therefore that PCHB had waived its certification right. The issue presented in this petition – is a state certifying agency's authority to issue a binding certification decision under Section 401 limited to the one-year period following the certification request – is no different than the issue addressed in *A.C.C.* and *Puerto Rico Sun Oil*.

The SJC's review of the legislative history of Section 401, explaining Congress's intent in adding the requirement that states must act on a request for certification within one year, does little to dispel the appearance that the SJC's decision was ends driven. The SJC notes with acceptance that:

> The legislative history of [Section 401] shows that Congress intended to prevent states

> from effectively denying approval of a project through lengthy delays. In 1969, Congressman Edmonson [sic], the sponsor of this provision, explained that, without the provision, the state "does not have any particular pressure to compel certification," but with the provision the state must "do away with dalliance or unreasonable delay" and vote "a *yes*" or "*no.*" 115 CONG. REC. 9259, 9264 (1969). Congressman Holifield explained that the provision prevents the state from "simply sit[ting] on its hands and do[ing] nothing." 115 CONG. REC. 9259, 9265.

App. A-10 (emphasis added). Despite recognizing that Congress intended Section 401 to require a yes or no determination on a request for water quality certification within one year after the request – a clear call for final agency action within that period – the SJC interpreted the legislative history as reflecting Congress's intent that only *some* agency action is required by Section 401 within the year following the request for certification.[9] App. A-13. Thus, the SJC concluded

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[9] The SJC stated that if Congress had intended that "all in-state appeals" must be completed within Section 401's one-year deadline, Congress would have used specific language to that effect. App. A-13. However, there is a sizable gap in the SJC's logic that it leaves un-bridged. At issue in the present case is whether DEP "acted on" FPL Energy's request for certification within the required one-year period even though the agency did not take final action until more than one year after the request. That final action was in the form of the Board's denial order on appeal. "All in-state appeals," which would include appeals to state court, encompass a much broader group of appeals than

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that while Congress sought to prevent states from sitting on their hands and doing nothing in the year immediately following a request for certification, Congress was indifferent to such inactivity after that first year passed.

This curious treatment of the legislative history, and the cursory effort to distinguish a denial of certification after the one-year deadline from the federal agency's discretion to accept conditions imposed by the state after the deadline, creates the appearance that the SJC was seeking to preserve Maine's potentially lengthy certification process in the face of the language in Section 401 that requires prompt action by the state.

B. Even if Section 401 Does Not Require Final Agency Action Within One Year, Action Taken Within One Year Cannot Be Disturbed.

Assuming *arguendo*, as the SJC reasoned, that the requirement in Section 401 that a certifying agency "act on" a request for certification within one

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the intra-agency appeal that occurred here. Notably, while an administrative agency has control over its process and how rapidly it makes decisions, an agency lacks similar control over state courts. It therefore does not follow, as the SJC contends, that the absence of specific statutory language in the CWA requiring that "all in-state appeals" must be completed within one year means that the words "act on" in Section 401 cannot mean final agency action.

year does not require final agency action, but simply some action, the SJC still made the wrong decision.

While DEP as the certifying agency did not take final action within the statutory deadline, the Commissioner did take some action, in issuing the certification. The SJC concluded that the Commissioner's action was sufficient to prevent waiver because the Commissioner "acted on" the request within the statutorily allowed time. But, even if that were true, it does not follow that further agency action beyond the one-year deadline can have the effect of reversing the agency action taken within the one-year deadline. Rather, as contemplated by Section 401, such action within the one-year deadline *is* the state's certification decision under Section 401, and it may be supplemented after the one-year deadline only with nonbinding conditions, as discussed in *Puerto Rico Sun Oil* and *A.C.C.*

Pursuant to the SJC's own reasoning, then, the DEP's only legally effective action consisted of the Commissioner's certification, not the Board's post-deadline denial of certification. That legally effective Commissioner's action, taken before the waiver deadline, in turn must become part of the final federal license. *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997) (stating that the federal licensing agency "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of Section(s) 401").

C. The SJC's Interpretation of Section 401 Renders the Waiver Provision Meaningless, Destroying the Federal/State Balance it was Intended to Ensure.

The precedent set by the SJC is dangerous. According to the SJC, so long as a certifying agency takes some action within one year after the request for certification, all subsequent action by that agency is insulated from waiver. This means there is no deadline by which a certifying agency must take final action, but rather only a deadline for commencing the certification process by taking some action. The practical result is that, so long as state certifying agencies take some action within one year, federal licensing agencies must wait, potentially indefinitely, for final certification.

A state agency thus effectively could deny a federal permit application or kill a project through incomplete action. Section 401 does not allow such a result. As *Puerto Rico Sun Oil* and *A.C.C.* demonstrate, agency action taken more than one year after the request for certification is inconsistent with Section 401 and, contrary to the SJC's holding in *FPL Energy*, is not binding on the federal licensing agency.

CONCLUSION

The balance of federal/state authority achieved by federal licensing programs is delicate. Whether Section 401 is allowed to be interpreted so as to destroy that balance is at issue here.

Section 401 of the Clean Water Act ensures that states, should they choose, may play an important role in the federal licensing of projects with the potential to impact water quality. The only constraint placed on a state's authority to grant or deny certification is the requirement that however the state chooses to act, it must do so within a reasonable period of time, which Congress has said may not exceed one year from the date of the certification request. A state's failure to act within a reasonable time period results in that state waiving its certification right.

The courts in *Puerto Rico Sun Oil* and *A.C.C.* recognized the significance of Section 401's one-year deadline in preserving the balance of federal/state authority in federal licensing programs. Those decisions also ensure that the one-year deadline both promotes and protects reasonable business investments by requiring completion of state certification within a reasonable period of time. The Maine SJC's *FPL Energy* decision, however, marks a dangerous departure from existing precedent and throws open the door for states to play an unintended, and potentially destructive, role in the federal licensing of

projects. FPL Energy asks this Court to grant certiorari so that this Court can resolve the conflict among the courts and ensure that, through the proper interpretation and application of Section 401, the state water quality certification process functions as Congress intended.

Respectfully submitted,

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Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 2007 ME 97
Docket: Ken-06-365
Argued: January 17, 2007
Decided: July 26, 2007

Panel: SAUFLEY, C.J., and CLIFFORD, ALEXANDER, LEVY, and *SILVER, JJ.**

FPL ENERGY MAINE HYDRO LLC

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

SILVER, J.

[¶1] FPL Energy Maine Hydro LLC appeals from a judgment entered in Superior Court (Kennebec County, *Marden, J.*) affirming the Board of Environmental Protection's denial of water quality certification for the Flagstaff Storage Project, owned and operated by FPL. The Board's denial reversed an earlier decision by the Department of Environmental Protection, which certified the Project. FPL argues that (1) because the Board acted after the one-year statutory deadline, either the Department waived certification or the Board's reversal of the Department's determination is ineffective; (2) the

* Justice Howard H. Dana Jr. sat at oral argument and participated in the initial conference but retired before this opinion was certified.

Board applied the wrong standard when analyzing the water quality; and (3) the Board erred in concluding that the Flagstaff Project does not meet the Class C water quality standards of 38 M.R.S.A. § 465(4) (2001 & Supp. 2003).[1] Because the Board's interpretation of the statute, the statute it is charged with administering, is reasonable, we affirm.

I. BACKGROUND

[¶2] This case concerns the Flagstaff Storage Project, which consists of a dam, known as the Long Falls Dam, a reservoir, called Flagstaff Lake, and appurtenant facilities. The Project is located on the Dead River in Somerset and Franklin counties. Originally constructed between 1948 and 1950, the dam was intended to control flooding, enhance log driving, and generate electricity.

[¶3] The Federal Power Commission, now called the Federal Energy Regulatory Commission (FERC), originally licensed the Project to the Central Maine Power Company (CMP) from April 12, 1979, to December 31, 1997. Before expiration of the

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[1] The Legislature has amended this statute several times since the Department and Board's judgments in this case. Title 38 M.R.S.A. § 465(4)(B) (2001) was amended by P.L. 2003, ch. 664, § 1 (effective July 30, 2004) and then repealed and replaced by P.L. 2005, ch. 409, § 2 (effective June 20, 2005). Title 38 M.R.S.A. § 465(4)(C) (2001) was amended by P.L. 2005, ch. 182, § 5 (effective Sept. 17, 2005). The current version of the statute is codified at 38 M.R.S. § 465(4) (2006).

Project's license, CMP filed two applications: one with the Department to obtain water quality certification, which would allow the Project to continue; and another with FERC requesting a new license for the Project.[2] CMP subsequently withdrew its application to the Department for water quality certification and refiled it once each year between 1997 and 1999.[3] FPL acquired the Project from CMP in 1999.

[¶4] FPL continued to refile the application for renewal of the Project until November 15, 2002, when FPL made its final filing. On November 14, 2003, 364 days later, the Department granted water quality certification for the continued operation of the Project. Specifically, when analyzing the aquatic habitat of Flagstaff Lake, the Department found in relevant part that, "[t]he available evidence indicates that the structure and function of the resident biological community in Flagstaff Lake is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude,"[4] and

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[2] Pursuant to 33 U.S.C.S. § 1341(a)(1) (2006), no federal license or permit shall be granted until the State, interstate agency, or Administrator, as the case may be, has granted or has waived certification.

[3] CMP did this at the request of the Department because a state waives certification if it does not act on an application within one year. *See* 33 U.S.C.S. § 1341(a)(1).

[4] The parties agree that in order to determine whether Flagstaff Lake meets Class C water quality standards, the lake's resident biological community must be assessed against an appropriate baseline. The standard employed by the Department, which compares an impoundment to another impoundment with

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it, therefore, concluded that FPL's proposal for managing water levels would be sufficient to meet applicable water quality standards.

[¶5] Subsequent to the certification, a group of non-governmental organizations, including Maine Rivers, Trout Unlimited, Appalachian Mountain Club, and the Natural Resources Council of Maine, filed a timely appeal of the order to the Board. The Town of Eustis, where part of the Dead River is located, also filed an appeal and requested a public hearing.

[¶6] On July 15, 2004, the Board issued a judgment, vacating the Department's decision and denying, without prejudice, FPL's application for water certification. The Board found that the Department had employed a new standard for assessing water quality when it used an impoundment-to-impoundment standard, which compares a storage reservoir to another storage reservoir with similar drawdowns.[5] The old standard, referenced by the Board in its decision, is a natural lake standard, which compares a storage reservoir to a natural lake.

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similar drawdowns, is referred to by the parties as the "impoundment-to-impoundment standard." The two other possible baselines, as described by the parties, are a natural lake, referred to as the "natural-lake standard" or the hydropower impoundment itself, referred to as the "what-you-see-is-what-you-get standard."

[5] Because the Board reversed the Department's decision, the Board found it unnecessary to consider the appeal of the Town of Eustis from that same decision.

[¶7] Having found that the Department used a new standard for assessing the water quality of the Project, the Board concluded that in order to obtain certification for this Project under the impoundment-to-impoundment standard, either the Department has to obtain EPA approval for its new standard or FPL should conduct a use attainability analysis (UAA), a review conducted when a state seeks to create a water sub-classification with less stringent standards. The Board also rejected FPL's argument that, regardless of whether an impoundment-to-impoundment standard applies, the Project meets Class C standards as a matter of law because it does not discharge a pollutant, as required by 38 M.R.S.A. § 465(4)(C) (2001) and 38 M.R.S. § 361-A (2006).[6]

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[6] Specifically, the Board made the following finding:

> With respect to the applicant's argument that a hydropower project would by definition meet the standards for resident biological community because there is no discharge of a pollutant, the Board finds that this reading of the law is too narrow and is inconsistent with a long line of FERC, EPA and DEP interpretations of the applicable laws vested in them. Indeed, the reason that FERC requires water quality certification for the relicensing of this project, and the reason that the Department took action upon it, all as consistent with other, similar projects across the state and the nation, stand as testament to the fact that the law requires certification. The absence of a pollutant does not ensure certification nor does it constitute compliance with the aquatic life standard. Rather, with respect to assessing compliance with the aquatic life standard, the comparison must be, at a minimum,

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[¶8] On August 9, 2004, FPL filed a petition for review of the Board's judgment to the Superior Court. On May 26, 2006, the court entered a judgment affirming the Board's decision to deny water quality certification. The Superior Court concluded that the Board's interpretation of the standard for water quality certification is entitled to deference, and thus, FPL should either obtain EPA approval for its impoundment-to-impoundment standard or it should conduct a UAA to recalibrate the water quality standards for water storage reservoirs. The court also concluded that the federal Water Quality Act requires certification because the Project releases a "discharge," and is, thus, subject to existing water quality standards.

[¶9] While certification was pending at the state level, FERC, the agency in charge of issuing federal licenses, was also taking action on FPL's application for a federal license. On March 30, 2004, after the Department granted certification, FERC issued an order granting FPL a new license for the Flagstaff Project. FPL Energy Maine Hydro LLC, 106 FERC ¶ 62,232 (2004). The Appalachian Mountain Club filed a request for rehearing, and while the request was pending, the Board issued its order denying certification. FPL Energy Maine Hydro LLC, 108 FERC ¶ 61,261 (2004). On September 21, 2004, FERC stayed its new license application because of

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to a "habitat which is free from the discharge of any pollutant."

the Board's denial of certification. *Id.* FPL filed a request for rehearing and on April 19, 2005, FERC denied FPL's request. FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104 (2005).

[¶10] On June 9, 2006, FPL filed a notice of this appeal to us.

II. STANDARD OF REVIEW

[¶11] Generally, "[s]tatutory construction is a question of law, subject to de novo review," however, "[w]hen a dispute involves an agency's interpretation of a statute it administers, the agency's interpretation, although not conclusive, is entitled to great deference and will be upheld unless the statute plainly compels a contrary result." *Town of Eagle Lake v. Comm'r, Dep't of Educ.*, 2003 ME 37, ¶¶ 7-8, 818 A.2d 1034, 1037 (quotation marks omitted). When the statute is ambiguous, we will "review whether the agency's construction is reasonable." *Id.* ¶ 8, 818 A.2d at 1037 (quotation marks omitted).

[¶12] When interpreting a statute, we first look to the plain meaning of the text, "to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Id.* ¶ 7, 818 A.2d at 1037 (quotation marks omitted). If there is an ambiguity in the plain meaning, we then look "beyond that language to the legislative history." *Id.* Finally, we will "consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result,

presumably the intent of the Legislature, may be achieved." *Id.* (quotation marks omitted).

[¶13] "When the Superior Court acts in an intermediate appellate capacity to review an administrative agency's decision pursuant to M.R. Civ. P. 80C, we directly review the agency's decision for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Town of Jay v. Androscoggin Energy, LLC,* 2003 ME 64, ¶ 10, 822 A.2d 1114, 1117.

[¶14] When an agency "act[s] as a tribunal of original jurisdiction, that is, as factfinder and decision maker, we review its decision directly." *Stewart v. Town of Sedgwick,* 2000 ME 157, ¶ 4, 757 A.2d 773, 775; *see also Aviation Oil Co. v. Dep't of Envtl. Prot.,* 584 A.2d 611, 614 (Me. 1990) (reviewing directly the Board's decision); 38 M.R.S. § 341-D(4)(A) (2006) ("The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner."). In this case, the Board made its own findings of fact and conclusions of law; therefore, we review those findings directly and grant deference to the Board.

III. DISCUSSION

A. The Requirement that the Board "Act on" the Application Within One Year

[¶15] Pursuant to 33 U.S.C.S. § 1341(a)(1) (2001), an applicant for federal licensing of an activity

that might cause a "discharge" into navigable waters, must first obtain either water quality certification that the activity complies with federal and state water protection laws, or waiver of such certification, by the state from which the discharge originates. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1846 (2006). The state must "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C.S. § 1341(a)(1). If the state does not "act on" a request within a year, then "the certification requirements . . . shall be waived." *Id.*

[¶16] The Department is the agency in Maine responsible for water quality certifications. *S.D. Warren Co.*, 126 S. Ct. at 1847. The Department includes the Board of Environmental Protection and the Commissioner of Environmental Protection. 38 M.R.S. § 341-A(2) (2006). With the exception of certain applications described in 38 M.R.S. § 341-D(2) (2006), the Commissioner makes determinations as to water quality certification. 38 M.R.S. § 344(2-A) (2006). An aggrieved party may appeal the Commissioner's certification judgment to the Board within thirty days of the filing of the Board's decision. 38 M.R.S. § 341-D(4).

[¶17] Since the Board's decision was issued more than one year after the application was filed, FPL argues that the Department waived certification or, in the alternative, that the Board's actions after the one-year deadline are ineffective. We must, therefore, address the section 1341 requirement that a

state "act on" an application within one year. Based on our analysis of the legislative history and caselaw, we conclude that the Board complied with the section 1341 requirement that it act on the application within one year.

[¶18] Section 1341 does not define "act on" and it is, therefore, unclear from the plain meaning of the statute whether the requirement is one of some action or final action. *See* 33 U.S.C.S. § 1341. Since the statute is ambiguous on its face, we must attempt to discern the legislative intent.

[¶19] The legislative history of section 1341 shows that Congress intended to prevent states from effectively denying approval of a project through lengthy delays. In 1969, Congressman Edmonson, the sponsor of this provision, explained that, without the provision, the state "does not have any particular pressure to compel certification," but with the provision the state must "do away with dalliance or unreasonable delay" and vote "a 'yes' or 'no.'" 115 CONG. REC. 9259, 9264 (1969). Congressman Holifield explained that the provision prevents the state from "simply sit[ting] on its hands and do[ing] nothing."[7] 115 CONG. REC. 9259, 9265.

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[7] In full he said:

> [T]his amendment guards against a situation where the water pollution control authority in the State in which the activity is to be located, or possibly in some other State, simply sits on its hands and does nothing.

(Continued on following page)

[¶20] We have not had occasion to define what constitutes "act[ing] on" a request for certification to meet the one-year requirement. FERC recently considered and rejected FPL's waiver arguments in its federal licensing proceeding for the Flagstaff Project.[8] In its order, FERC rejected FPL's arguments that the Department had waived certification by failing to complete the appeal within one year. FPL

> Any such dalliance could kill a proposed project just as effectively as an outright determination on the merits not to issue the required certificate. Thus while this bill would still permit one State to make a decision that would have extraterritorial effect upon another, at least now it cannot do so passively – it has to take affirmative action to consider the matter and to decide to withhold the certificate if it wants to defeat a proposed project.

115 CONG. REC. 9259, 9265 (1969).

[8] FPL also argues that the FERC decision renders this issue moot. We find this argument unpersuasive. Despite "rais[ing] a justiciable controversy at the time the complaint was filed," an appeal is moot "if the passage of time and the occurrence of events deprive the litigant of an ongoing stake in the controversy." *Carroll F. Look Constr. Co. v. Town of Beals*, 2002 ME 128, ¶ 6, 802 A.2d 994, 996 (quotation marks omitted). However, if "sufficient practical effects can flow from the litigation to justify the use of limited judicial resources," then the case is not moot. *Id.*

In this case, FERC only "stay[ed] the new license . . . pending the outcome of any appeal of the certification denial, and reserve[d][its] authority to modify the new license as necessary to incorporate the conditions to any new certification that is issued." FPL Energy Maine Hydro LLC, 108 FERC ¶ 61,261 (2004). Thus, further litigation may have an effect on the agency's decision and the issue is not moot.

Energy Maine Hydro LLC, 108 FERC ¶ 61,261. The agency held that "[t]here is nothing in the language of Section 401 to suggest that a state must not only act on the certification request but also take action on any appeals that might subsequently be filed within one year." *Id.*

[¶21] Although we normally pay deference to an agency's interpretation of a statute, a number of federal courts have held that FERC is not entitled to deference in its interpretation of the Clean Water Act. *See, e.g., Ala. Rivers Alliance v. FERC,* 325 F.3d 290, 296-97 (D.C. Cir. 2003); *Cal. Trout, Inc. v. FERC,* 313 F.3d 1131, 1133-34 (9th Cir. 2002); *Am. Rivers, Inc. v. FERC,* 129 F.3d 99, 107 (2d Cir. 1997). Although we do not accord total deference, we look to the FERC decision for cogent analysis.

[¶22] FPL relies on a case from the U.S. District Court for the Western District of Washington, *Airport Communities Coalition v. Graves,* 280 F. Supp. 2d 1207, 1214-17 (W.D. Wash. 2003), which held that where a state board issued a decision on appeal more than one year after the certification request, and the board's decision affirms certification subject to additional conditions, the federal agency "need only incorporate such conditions issued after a year solely in its discretion." The District Court did not hold that the agency's failure to issue a decision on appeal within a year of the request meant that the certification was deemed waived. *Id.*

[¶23] We conclude that the Board's failure to decide the appeal within a year of FPL's initial request for certification does not waive certification or render its decision ineffective. Our analysis of the legislative history indicates a congressional intent that an agency take action on an application within one year. There is no indication, however, that Congress intended for all in-state appeals to be completed within the same one-year deadline. If Congress intended to impose such extreme time pressure, it would have used specific language to that effect. We, thus, agree with the reasoning of FERC and conclude that the Board's actions were timely.

B. The Baseline Standard for Class C Water Quality

1. Deference to the Board's Interpretation

[¶24] In this case, the Board concluded that "[t]he impoundment-to-impoundment comparison, which compares one disturbed site to a similarly disturbed site, constitutes a dramatic change in the [applicable] Class C [water quality] standard and, as such, legally requires the approval of EPA prior to implementation in accordance with provisions of the federal Clean Water Act." We have held that the Board is entitled to deference in its interpretation of the statutes it is charged with administering. *See, e.g., S.D. Warren Co. v. Bd. of Envt'l Prot.*, 2005 ME 27, ¶ 5, 868 A.2d 210, 214; *Maritime Energy v. Fund Ins. Review Bd.*, 2001 ME 45, ¶ 9, 767 A.2d 812, 814. Since the Board is charged with administering the

water quality standards in Maine pursuant to 38 M.R.S.A. § 465 (2001 & Supp. 2003), we must grant deference to the Board's interpretation as long as its construction is reasonable. *See Maritime Energy,* 2001 ME 45, ¶ 10, 767 A.2d at 814. "The rationale underlying our deference to [the Board's] interpretations is that the [Board] has greater expertise in matters of environmental concern and greater experience administering and interpreting those particular statutes." *S.D. Warren Co.,* 2005 ME 27, ¶ 5, 868 A.2d at 214. We must, therefore, determine whether the Board's conclusion is reasonable and comports with legislative intent.

2. Plain Meaning of 38 M.R.S.A. § 465(4)

[¶25] The first step in statutory interpretation is to discern legislative intent from the plain meaning of the statute. *DaimlerChrysler Corp. v. Executive Dir., Me. Revenue Servs.,* 2007 ME 62, ¶ 9, 922 A.2d 465, 469. Pursuant to the Clean Water Act and its implementing regulations, states are required to designate uses of waterbodies within their borders. 33 U.S.C.S. § 1313 (2001); 40 C.F.R. § 131.10 (2006). Once such designated uses have been established and approved by the EPA, states are permitted to adopt subcategories of use for specific waterbodies, requiring less stringent criteria, provided they conduct a UAA and obtain EPA approval of any subcategory. 40 C.F.R. §§ 131.10(g), (j), 131.20(c) (2006). Class C is Maine's minimum EPA-approved water quality standard for hydropower impoundments and, therefore,

under federal law, Maine is not permitted to apply a less stringent standard than Class C to a hydropower impoundment unless a UAA has been conducted and EPA approval has been obtained. *See* 38 M.R.S.A. § 464(9) (Supp. 1992); 38 M.R.S.A. § 465(4)(C); 33 U.S.C.S. § 1313; 40 C.F.R. §§ 131.10(g), (j), 131.20(c).

[¶26] At the time FPL's certification was pending, the Class C water classification standards provided that "[d]ischarges to Class C waters may cause *some changes to aquatic life,* provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community."[9] 38 M.R.S.A.

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[9] Title 38 M.R.S.A. § 465(4) (2001 & Supp. 2003) provided:

§ 465. Standards for classification of fresh surface waters

The department shall have 4 standards for the classification of fresh surface waters which are not classified as great ponds.

. . . .

4. Class C waters. Class C shall be the 4th highest classification.

A. Class C waters must be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; agriculture; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; navigation; and as a habitat for fish and other aquatic life.

(Continued on following page)

§ 465(4) (C) (emphasis added). The Class C standards further provided that the waters "shall be of such quality that they are suitable . . . as a habitat for fish and other aquatic life." 38 M.R.S.A. § 465(4)(A).

[¶27] The statute creates a hierarchy of standards, with Class AA standards being the highest and Class C standards being the lowest. *See* 38 M.R.S.A. § 465. At the time of certification, the statute provided that Class AA waters "shall be characterized as

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B. The dissolved oxygen content of Class C water may be not less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes must be maintained. Between May 15th and September 30th, the number of Escherichia coli bacteria of human origin in these waters may not exceed a geometric mean of 142 per 100 milliliters or an instantaneous level of 949 per 100 milliliters. The board shall promulgate rules governing the procedure for designation of spawning areas. Those rules must include provision for periodic review of designated spawning areas and consultation with affected persons prior to designation of a stretch of water as a spawning area.

C. Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community.

free flowing and natural,"[10] "[t]he aquatic life, dissolved oxygen and bacteria content . . . shall be as naturally occurs,"[11] and "[t]here may be no direct discharge of pollutants to Class AA waters, except storm water discharges." 38 M.R.S.A. § 465(1)(A), (B), (C).

[¶28] Based on a plain reading of the statute, it is not clear what baseline was intended for the Class C standards. However, the Board interpreted the baseline to be a "natural lake" standard and such a reading is reasonable based on the language of the statute. The Legislature created a hierarchy of standards, with Class AA being the highest and Class C being the lowest. Since Class AA standards require "natural" conditions, it is reasonable to read all other standards as measured against the Class AA baseline. We must next examine the legislative history of section 465 to determine whether the Board's interpretation is aligned with the Legislature's intent and is reasonable pursuant to the statute's history.

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[10] Title 38 M.R.S. § 466(9) (2006) defines "[n]atural" as "living in, or as if in, a state of nature not measurably affected by human activity."

[11] "As naturally occurs" is defined as "conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity." 38 M.R.S. § 466(2) (2006).

3. Legislative History

[¶29] FPL contends that there are three events in the legislative history of 38 M.R.S. § 464, which demonstrate legislative intent that the baseline standard for Class C waters be the "impoundment-to-impoundment" standard, rather than the "natural lake" standard. FPL points to the March 1992 amendment of the statute, the legislative resolve passed in May 2003, and Maine's antidegradation law. We examine each in turn.

4. The March 1992 Amendment

[¶30] In March 1992, the Legislature amended the water classification laws by enacting 38 M.R.S.A. § 464(9) (Supp. 1992) to provide that Maine's hydropower impoundments comply with the certification standards if "[t]he existing impounded waters are able to support all species of fish indigenous to those waters and the structure and function of the resident biological community in the impounded waters is maintained." P.L. 1991, ch. 813, § A-1 (effective June 30, 1992). According to the parties, this standard became known as the "what-you-see-is-what-you-get" standard because it attempted to maintain the status quo for Maine's hydropower impoundments.

[¶31] On January 14, 1993, the EPA formally disapproved of 38 M.R.S.A. § 464(9) as amended, explaining that it is inconsistent with federal requirements because it attempts to create a new subcategory without requiring a UAA and providing

for public participation.[12] As a result of the EPA's disapproval, the Legislature amended the statute to apply the "what-you-see-is-what-you-get" standard to only one impoundment, the Ripogenus impoundment, because a UAA had been conducted for that impoundment. *See* P.L. 1993, ch. 344, § 2 (effective Oct. 13, 1993) (codified at 38 M.R.S.A. § 464(9) (Supp. 1992)). The amendments made clear that Class C water quality standards apply to all other hydropower impoundments. *Id.* Title 38 M.R.S.A. § 464(9), effective at the time of the Commissioner's certification in this

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[12] Prior to this formal disapproval, the EPA sent a letter to the Department on May 19, 1992, communicating its concern that 38 M.R.S.A. § 464(9) (Supp. 1992), as amended, would not meet federal requirements. Attached to the letter, the EPA provided its "[r]eview and [a]nalysis" of the new statute, which stated:

> [The] EPA could approve the legislation if it is only clarifying that for all existing GPA hydropower impoundments, including those with significant level fluctuations, that the Class GPA "natural" aquatic life criteria are not applicable but that the impoundment must meet the minimum requirement of the Class C aquatic life criteria. . . . Moreover, Part A may be acceptable *even if* it creates a new subcategory of Class C which goes below the minimum aquatic life criteria of Class C, *provided that* the provision is found, by the State Attorney General, to require the State to follow the necessary federal procedures before a waterbody is placed into this new subcategory. . . . Under federal law, before the State can move an impoundment into this new subcategory, it must first provide the necessary justification (i.e., UAA) and opportunity for public participation.

(Emphasis in original.)

case, contained identical language to the statute as amended in 1993.

[¶32] FPL contends that the 1992 amendments to section 464 show that the legislative intent has always been to compare hydropower impoundments to impoundments rather than natural lakes. We do not view this history as FPL does. The events in 1992 reflect an attempt by the Legislature to impose lower standards without following the proper procedures. The EPA's express disapproval of the Legislature's actions in 1992 shows that such standards were a departure from the norm. Furthermore, the standard proposed in 1992, which required a comparison between an impoundment and itself, is a different standard from the "impoundment-to-impoundment" standard at issue now. This history does not undermine the Board's conclusion that the "impoundment-to-impoundment" standard is a new standard requiring EPA approval.

5. The 2003 Resolve

[¶33] In May 2003, the Legislature passed a Resolve, which directed the Department to "adopt rules" requiring that "the structure and function . . . that must be maintained in a water storage reservoir is the structure and function that would be expected to exist in a water storage reservoir with a drawdown

of similar magnitude."[13] L.D. 1059 (121st Legis. 2003). The Resolve defined water storage reservoir as "an impoundment associated with a hydropower project."

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[13] The Legislature's Resolve stated in full:

> **Sec. 1 Water storage reservoirs; rules. Resolved:** That the Department of Environmental Protection, Board of Environmental Protection shall adopt rules under the Maine Revised Statutes, Title 38, section 464, subsection 5 relating to protocols and procedures for evaluation of the resident biological community in water storage reservoirs. In adopting the rules, the Board of Environmental Protection shall recognize that water storage reservoirs are artificial and are not natural water bodies, and the rules must ensure that the existing uses of water storage reservoirs are maintained and protected. In issuing licenses, permits and certifications prior to final adoption of the rules, the Department of Environmental Protection shall recognize that water storage reservoirs are artificial and are not natural water bodies and shall ensure that the existing uses of water storage reservoirs are maintained and protected. The goal of the rules and any license, permit or certification must be to require that the structure and function of the resident biological community that must be maintained in a water storage reservoir is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude. As used in this resolve, "water storage reservoir" means an impoundment associated with a hydropower project, as defined by Title 38, section 632, that was in existence prior to November 28, 1975, was not primarily lacustrine in its natural state, is classified under Title 38, section 465-A and is managed to store and release water on an annual cycle to benefit downstream hydropower generation.

[¶34] Pursuant to 38 M.R.S. § 342(9) (2006), the Commissioner of the Department "may submit to the board new or amended rules for its adoption." It is the Board, however, that has final authority to adopt a new rule pursuant to 38 M.R.S. § 341-D(1-B) (2006).[14] Following the passage of the 2003 Resolve, the Commissioner drafted an order granting water quality certification to the Flagstaff Project, using the criteria articulated in the Resolve.

[¶35] On November 10, 2003, the EPA sent a letter to the Department disapproving of the Commissioner's use of this standard because "this new legislation is not in effect for federal law purposes and cannot be relied upon for [the Clean Water Act] certification." The EPA wrote "[the Department] now asserts that, rather than comparing a storage reservoir to a natural lake as it has done since 1995, [the Department] is now adopting the policy (at least

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[14] Title 38 M.R.S. § 341-D(1-B) (2006) states:

§ 341-D. Board responsibilities and duties

. . . .

1-B. Rulemaking. Subject to the Maine Administrative Procedure Act, the board shall adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering. The board shall also adopt, amend and repeal rules as necessary for the conduct of its business.

(Footnote omitted.)

orally) that storage reservoirs shall be compared to other impoundments with similar drawdowns."

[¶36] FPL contends that the 2003 Resolve indicates clear legislative intent that the impoundment-to-impoundment standard is, and has always been, the appropriate standard to determine compliance with Class C water quality standards pursuant to 38 M.R.S.A. § 465(4). Although we agree with FPL that the Resolve indicates legislative intent that the impoundment-to-impoundment standard apply now, we see no reason why the Legislature would issue a resolve directing the Commissioner to "adopt rules" if such a standard already existed. The 2003 Resolve demonstrates the Legislature's intention to promulgate a new rule. However, because of the EPA's disapproval, a new rule was not adopted.

6. The Antidegradation Law

[¶37] Also effective in 2003 was Maine's antidegradation law, 38 M.R.S. § 464(4)(F) (2006),[15] which

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[15] Title 38 M.R.S. § 464(4)(F) (2006) provides in relevant part:

> **4. General provisions.** The classification system for surface waters established by this article shall be subject to the following provisions.
>
> . . . .
>
> **F.** The antidegradation policy of the State is governed by the following provisions.
>
> **(1)** Existing in-stream water uses and the level of water quality necessary to protect those

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existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body.

Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department. In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and:

(a) Aquatic, estuarine and marine life present in the water body;

(b) Wildlife that utilize the water body;

(c) Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;

(d) The use of the water body for recreation in or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; and

(e) Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or approve a

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provides that "[e]xisting instream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected." The

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water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, when the department finds that:

(a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. For purpose of this division, significant impact means:

(i) Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or

(b) The existing in-stream use involves use of the water body for recreation in or on the water, fishing, water supply or commercial enterprises that depend directly on the preservation of an existing level of water quality and the applicant has demonstrated that the proposed activity would not result in significant degradation of the existing use.

The department shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

If the department fails to find that the conditions of this subparagraph are met, water quality certification, pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, is denied.

(Footnotes omitted.)

statute defines an "existing in-stream water use" to include "[t]he use of the water body for . . . water supply, or commercial activity that depend[s] directly on the preservation of an existing level of water quality." 38 M.R.S. § 464(4)(F)(1)(d). The antidegradation law requires an applicant seeking protection as an "existing in-stream use" to "demonstrate[] that the proposed activity would not have a significant impact on the existing use" in order to obtain water quality certification pursuant to the Clean Water Act. 38 M.R.S. § 464(4)(F)(1-A)(a).

[¶38] We do not interpret Maine's antidegradation law as exempting the Project from the requirements of the Clean Water Act simply because the Project is an existing in-stream use. Instead, 38 M.R.S. § 464(4)(F)(1-A) provides an additional requirement that must be met in order for FPL to obtain water quality certification pursuant to the Clean Water Act.

[¶39] This history demonstrates legislative attempts to change the baseline standard against which hydropower impoundments are to be judged, however, it does not support FPL's contentions that the "impoundment-to-impoundment" standard has always been the applicable standard. We conclude that based on the legislative history, the Board's judgment that the "impoundment-to-impoundment" standard represents a "dramatic change from past practice" and, thus requires EPA approval, is reasonable. We, therefore, defer to the Board's expertise and affirm its conclusion.

C. Compliance with Class C Standards

[¶40] FPL finally argues that the Project meets the definition of Class C water quality standards under 38 M.R.S.A. § 465(4)(C) because the Project does not discharge pollutants. The Board found this interpretation of the statute "too narrow" and "inconsistent with a long line of FERC, EPA and [Department] interpretations of the applicable laws vested in them."

[¶41] The Class C water quality standards provide that "[d]ischarges to Class C waters may cause some changes to aquatic life." 38 M.R.S.A. § 465(4)(C). Title 38 M.R.S. § 361-A(1) (2006) defines "discharge" to mean "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the State." Title 38 M.R.S. § 361-A(4-A) (2006) defines "[p]ollutant" as "dredged spoil, solid waste, junk, incinerator residue, sewage, refuse, effluent, garbage, sewage sludge, munitions, chemicals, biological or radiological materials, oil, petroleum products or by-products, heat, wrecked or discarded equipment, rock, sand, dirt and industrial, municipal, domestic, commercial or agricultural wastes of any kind."[16]

[16] We note that the definition of "[p]ollutant" includes "sand [and] dirt." Generally the water flowing into hydropower impoundments is filled with sand and/or dirt that gets trapped in the impoundment, thus increasing the levels of these "pollutants" in

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[¶42] We once again defer to the Board's expertise in interpreting this provision. The Board found FPL's argument unpersuasive because "this reading of the law is too narrow and is inconsistent with a long line of FERC, EPA and [Department] interpretations of the applicable laws vested in them." The Board's interpretation is reasonable because, without the discharge requirement, the Class C certification process for hydropower impoundments would be no more than rubber stamp approval. *See, e.g., S.D. Warren Co.*, 2005 ME 27, ¶ 17, 868 A.2d at 217 (interpreting the term "discharge" in the Clean Water Act to include the "addition" of water from one body to another), *aff'd,* 126 S. Ct. 1843 (2006).

[¶43] Because we defer to the agency interpretation, and the Board's findings are reasonable, we affirm the Board's decision.

The entry is:

Judgment affirmed.

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the water. However, since the Department does not make this argument, we do not address its merits.

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STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-04-50

FPL ENERGY MAINE HYDRO, LLC,

Petitioner

v.

DECISION AND ORDER

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent

This matter is before the court on petition of FPL Energy Maine Hydro, LLC's ("FPL" or "petitioner") for review of final agency action pursuant to M.R. Civ. P. 80C (2005) and petitioner's motion to strike, pursuant to M.R. Civ. P. 80C(d) and (f).

This case involves the certification of the Flagstaff Storage Project ("Project") (which consists of a dam, reservoir, and appurtenant facilities), and whether or not clean water standards for the Project should be based on other similar bodies of water (an "impoundment to impoundment" standard) or on "natural" bodies of water. Water quality standards are implicated because of the large drawdowns hydroelectric dams call for in order to produce energy.[1]

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[1] Hydroelectric dams can deplete reservoirs over 30 feet at a time, thereby reducing the chance of survival of aquatic life. The

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The parties agree on the facts pertinent to the dispute, but there are numerous procedural and legal differences between the parties that constitute the bulk of their dispute.

The petition alleges the following: FPL owns and operates the Project, which it acquired from Central Maine Power in 1999. The federal Clean Water Act requires applicants for a federal license that might involve a discharge into navigable waters to obtain certification of water quality from the state in which the discharge originates. Federal Water Pollution Control Act (the "Clean Water Act") § 401, 33 U.S.C. § 1341(a)(1) (2005). From December 1996 (when CMP still owned the Project) to November 15, 2002, an application for certification was filed and then withdrawn on an annual basis with Maine's Department of Environmental Protection ("DEP" or "respondent"), without the DEP acting on it. FPL filed its requests for certification with a reservation to challenge the applicability of the certification requirement. On November 14, 2003, the DEP Commissioner issued the certification pursuant to Maine and federal law, indicating that the continued operation of the Project would not violate applicable water quality standards, subject to numerous conditions. *See* 38 M.R.S.A. §§ 361-A, 464 (2005); 33 U.S.C. § 1341(a)(1).

Department of Environmental Protection recommends drawdowns of no more than 11 feet.

On December 9, 2003, Maine Rivers, Trout Unlimited, Appalachian Mountain Club, and the Natural Resources Council of Maine ("the NGOs") filed a timely appeal to the Board of Environmental Protection ("BEP" or "Board"). On July 15, 2004 the BEP granted the appeal, reversing the Commissioner's certification of the Project. This petition followed, sounding in two counts. First, that DEP exceeded its authority by engaging in the certification process at all. The Clean Water Act requires clean water certification only if there is a discharge into navigable waters and that discharge contains pollutants. *See* 33 U.S.C. § 1341. Further, the DEP has one year to act on a certification application, and if it does not do so, certification is waived. *See id.* Count I alleges that DEP's failure to act in a timely manner, and DEP's engaging in the certification process at all when no discharge or pollutant was involved resulted in DEP exceeding its mandate.

Second, FPL alleges that the Board committed errors of law and abused its discretion when it made conclusions relating to the water quality standards and procedures for applying those standards (to be discussed further *infra*), including granting standing to the NGOs for filing their appeal in the first place.

The petition for review was filed on August 9, 2004. The certification of the record was disputed by both parties, culminating in a decision and order of April 22, 2005, denying the admission of an audio tape of BEP deliberations, but also denying the inclusion of a Federal Energy Regulatory Commission

("FERC") decision, which was made after the DEP's ruling denying certification, and thus not a decision that was relied upon by the DEP.

The petitioner's 80C brief, the DEP's and intervenor NGOs response briefs,[2] and the petitioner's reply brief were all filed in a timely manner, pursuant to a scheduling order. An *amicus curiae* brief in support of petitioner's position was filed. The petitioner then filed a motion to strike and respondent DEP timely filed a reply.

When the decision of an administrative agency is appealed pursuant to M.R. Civ. P. 80C, this Court reviews the agency's decision directly for abuse of discretion, errors of law, or findings not supported by the evidence. *Centamore v. Dep't of Human Services,* 664 A.2d 369, 370 (Me. 1995). "An administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found the facts as it did." *Seider v. Board of Exam'r of Psychologists,* 2000 ME 206 ¶ 9, 762 A.2d 551, 555 (Me. 2000) (citing *CWCO, Inc. v. Superintendent of Ins.,* 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261 (Me. 1997)). In reviewing the decisions of an administrative agency, the Court should "not attempt

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[2] Note that the NGOs are seeking to intervene pursuant to 5 M.R.S.A. § 11005 and M.R.C.P. 80C; section 11005 provides that "all parties to the agency proceeding who wish to participate in the review shall file a written appearance . . . " Petitioner disputes the intervenors' claim that they are a party to the agency proceeding.

to second-guess the agency on matters falling within its realm of expertise" and the Court's review is limited to "determining whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Imagineering v. Superintendent of Ins.*, 593 A.2d 1050, 1053 (Me. 1991). The focus on appeal is not whether the Court would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence that supports the result reached by the agency. *CWCO, Inc.*, 1997 ME 226, 703 A.2d 1258, 1261. "Inconsistent evidence will not render an agency decision unsupported." *Seider*, 762 A.2d 551 (citations omitted). The burden of proof rests with the party seeking to overturn the agency's decision, and that party must prove that no competent evidence supports the Board's decision. *Id.* "[Petitioner] must prove that no competent evidence supports the Board's decision and that the record compels a contrary conclusion." *Bischoff v. Board of Trustees*, 661 A.2d 167, 170 (Me. 1995).

Factual determinations must be sustained unless shown to be clearly erroneous. *Imagineering*, 593 A.2d at 1053 (noting that the Court recognizes no distinction between the clearly erroneous and substantial evidence in the record standards of review for factual determinations made by administrative agencies). "A party seeking review of an agency's findings must prove they are unsupported by *any* competent evidence." *Maine Bankers Ass'n v. Bureau*, 684 A.2d 1304, 1306 (Me. 1996) (emphasis added).

"When the dispute involves an agency's interpretation of a statute administered by it, the agency's interpretation, although not conclusive on the Court, is accorded great deference and will be upheld unless the statute plainly compels a contrary result." *Maine Bankers Ass'n,* 684 A.2d at 1306 (citing *Centamore v. Department of Human Services,* 664 A.2d 369, 370 (Me. 1995)).

Petitioner's Brief

The substantive dispute between the parties involves which water quality standard to apply to the Project. Petitioner's brief outlines the contours of that debate, stating that between 1995 and 2003, DEP maintained that the Project's water quality should match that of a "natural" lake, while FPL (and CMP previously) contended that a distinct standard should apply to water storage reservoirs. The confusion surrounding the applicable water quality standard originated in 1986, when water storage reservoirs were classified as "natural" by the (then) current legislation, 38 M.R.S.A. § 465-A(1)(A), § 466(9). By 1991, when FERC re-licensed another reservoir system in Maine (Chesuncook Lake), DEP became concerned that the large drawdowns of water that occur in reservoirs meant that those impoundments would not be able to meet "natural" aquatic standards. A Maine law was thus passed in 1992 amending 38 M.R.S.A. § 464(9), to acknowledge that Chesuncook Lake would have to meet less stringent water quality standards, but that all other "existing

impoundments" would have to meet so-called "Class C" standards.[3] Such an amendment of standards required a Use Attainability Analysis ("UAA") that had to be approved by the EPA. FPL maintains that such approval was granted by the EPA in 1993, and the Maine legislature amended 38 M.R.S.A. § 464(9) accordingly.

Prior to 2003, FPL and DEP agreed that Class C standards applied to the Project, but DEP interpreted that to mean that the Project had to maintain aquatic life in the reservoir akin to what would be found in a "natural" lake. FPL argues that the legislative amendments discussed *supra* were adopted precisely to combat this interpretation. Alternatively, the lower "what you see is what you get" standard applied to Chesuncook Lake would not pertain, as that lower standard was approved only for that particular project. FPL thus urges the adoption of a "middle road" – a standard higher than that adopted for Chesuncook Lake, but one lower than that applied to "natural" bodies of water. It thus concludes that a comparison to water storage reservoirs with drawdowns of similar magnitude would be the most appropriate way to assess whether or not the Project met acceptable water quality standards.

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[3] Class C standards still require that aquatic life be sustained, but that "some changes" to aquatic life are permissible. *See* 39 M.R.S.A. § 465(4)(C) (2005).

In 2003, Governor Baldacci signed L.D. 1059, Resolves 2003, ch. 37 ("Chapter 37") which stated in part, "The goal of the rules and any license, permit or certification must be to require that the structure and function of the resident biological community that must be maintained in a water storage reservoir is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude."[4] There was some dispute at the state level as to whether or not Chapter 37 triggered the need for EPA approval, as it could be interpreted as introducing a new water quality standard. Therefore, without reference to Chapter 37, the DEP Commissioner approved the FPL certification application on November 14, 2003, essentially embracing the FPL position on water quality standards by stating that DEP was interpreting existing standards, not introducing a new one.

The NGOs then appealed the Commissioner's decision to the BEP. The BEP overturned the Commissioner's certification of the FPL Project, stating that the "impoundment to impoundment" standard used by DEP was contrary to that which the EPA approved in 1992, and contrary to how DEP had been interpreting existing law in recent years. The BEP urged the DEP to either obtain EPA approval of the "impoundment to impoundment" standard (embodied in Chapter 37), or conduct a UAA in order to

[4] Chapter 37 amended 28 M.R.S.A. § 466(10), which defines "resident biological community."

recalibrate the water quality standards for water storage reservoirs.

As a threshold matter, petitioner argues over the standard of review, asserting that reliance on the Commissioner's initial decision should outweigh the importance of the reversal of that decision by the (lay) BEP. It is the Commissioner, and not the BEP, who has the requisite expertise to interpret and administer relevant statutes. Citing *S.D. Warren Co. v. Bd. of Envtl. Prot.,* FPL maintains that though BEP is accorded deference when interpreting federal environmental statutes, that deference is due to BEP's having greater experience than do courts, not the Commissioner, in interpreting those statutes. *See* 2005 ME 27, ¶ 5, 868 A.2d 210, 214. FPL also asserts that legislative intent trumps agency interpretation of a statute when the two conflict. *See Cent. Maine Power Co. v. Maine Pub. Utils. Com.,* 436 A.2d 880, 885 (1981). As discussed *infra,* FPL will attempt to demonstrate that the legislative intent behind Maine's water classification standards conflicts with the DEP's interpretation of those standards, and thus the legislative intent should prevail.

As a secondary threshold matter, petitioner argues that the NGOs did not have standing to have appealed the Commissioner's decision to the BEP because they did not suffer a "particularized injury." *See Storer v. Dep't of Envtl. Prot.,* 656 A.2d 1191, 1192 (Me. 1995). According to petitioner, DEP regulations regarding standing are similar to the test used in Maine courts, namely whether or not a party has

suffered a particularized injury as a result of a licensing or other decision. The petitioner asserts that the NGOs refer to their broad missions of environmental protection, but do not allege a sufficient harm to create standing on their behalf or through their members on their behalf. Petitioner also points out that only one of the four NGOs participated in the drafting of the new water certification standards, and the comments made at that time are in direct conflict with those made in the subsequent appeal to the BEP. If the NGOs had no standing to appeal the certification of FPL, then the BEP decision supporting that appeal must be invalidated and reversed.

Next, FPL argues that DEP waived certification altogether by failing to do so within the one year deadline established by federal statute. *See* 33 U.S.C. § 1341(a). In the alternative, the BEP decision reversing FPL's certification was made after the one-year deadline, and thus should not be upheld. FPL traces legislative history describing how an Executive Order of Governor King named the DEP as the water quality standard certifying agency under FERC regulations. The Commissioner and BEP are part of the DEP, but it is the DEP and not either one of these entities comprising it that has certification authority. Though the DEP Commissioner certified the Project within one year of FPL's most recent application, the BEP decision reversed that certification after that one-year deadline. The BEP decision was the "final agency action" and as that final agency action occurred too late, DEP should be viewed as having

waived certification altogether. FPL's interpretation of timelines necessitates that it view section 401 as requiring "final agency action" when it states "If the State, interstate agency, or Administrator, as the case may be, fails to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." Section 401. FPL concedes that a court, pursuant to an 80C petition for review would be able to overturn a final agency action after that one year deadline; however an agency cannot overturn its own decision outside of that one year deadline, which is what the BEP did on July 15, 2004. FPL cites a recent Washington District Court decision – clearly not controlling authority in Maine – for the proposition that interpretations of deadlines pursuant to section 401 "must mean that the issuance of state conditions outside the one-year time period must be treated differently than the issuance of such conditions occurring within that period." *See Airport Communities Coalition v. Graves,* 280 F. Supp. 2d 1207, 1215 (W.D. Wash. 2003).

FPL's most substantive argument points to the Project's not needing to be certified at all under the Clean Water Act because it does not discharge anything, let alone pollutants, into navigable waters. The Law Court has recently determined that a discharge results when "dams remove water from its natural course, exercise private control over the water, and then *add* the water back into the river." *S.D. Warren*

Co. v. Bd. of Envtl. Prot., 2005 ME 27, ¶ 13, 868 A.2d 210, 216 (emphasis in original).[5] The Law Court urged a broad interpretation of "discharge," to include releases from a source point that are both polluting and non-polluting. *See id.* at ¶ 14, 868 A.2d at 216 (citation omitted). As section 401 applies to discharges into navigable waters, the Law Court has held that hydroelectric dams and reservoirs release such discharges, and thus certification by the DEP is required.

In order to distinguish the FPL Project from the situation that was under review in *Warren* (five contiguous hydroelectric dam projects on the Presumpscot River in Cumberland County), the petitioner asserts that Warren did not address "the question of whether Maine Water Quality Law requires the presence of a pollutant to trigger the need for certification." Petitioner maintains that this law unambiguously links "pollutant" with "discharge," such that if no pollutant is discharged, no certification is required. *See* 38 M.R.S.A. § 361-A(1) (defining "discharge" as "any spilling, leaking, pumping, pouring, emptying, dumping, disposing or other addition of any pollutant to water of the State."). Petitioner asserts that it will operate the Project in much the same manner in which it has been operated for decades, with "additional environmental enhancements"

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[5] The Law Court decision was affirmed by the United States Supreme Court on May 15, 2006, No. 04-1527.

that will not produce any discharge into navigable waters. *See id.*

FPL further contends that if certification were required, federal EPA approval was not necessary because no new standard was created for the Project. In its decision reversing the Commissioner's certification of the Project, BEP maintained that her doing so departed significantly from past DEP practice, creating a new standard for reservoirs (below Class C) and doing so would need EPA approval. As discussed *supra,* FPL states that the Project should be evaluated based on Class C criteria, which it interprets to encompass a comparison to other reservoirs, not "natural" lakes. In addition, FPL asserts that the Commissioner's interpretation of the standards does not change the standards themselves, further negating the need for EPA approval of the certification.

Drawing its argument to a close, FPL says that reversing the certification violates the Antidegredation Law, which states that "existing in-stream uses 'must be maintained and protected.'" *See* 38 M.R.S.A. § 464(4)(F)(1). Any in-stream use that has been in effect since 1975 qualifies for such protection, and FPL does not interpret the statute as prioritizing preservation of aquatic life over use of a body of water to generate electricity. *See id.* By not certifying the Project, the DEP would be disrupting an established in-stream use and thus not only violate the Antidegredation Law, but also offend Maine's stated energy policy goals, which include supporting the continued use of "indigenous hydro energy resources."

Respondent's Brief

The DEP begins its brief with an overview of the statutory and regulatory scheme pertaining to the certification of water quality in Maine. First, it outlines the requirements of the Clean Water Act, which echo FPL's interpretation of the statute, so will not be rehashed here. Next, DEP outlines the role of FERC in issuing new licenses for existing hydropower dams. *See*16 U.S.C. § 808(a)(2). FERC also requires state certification of water quality (or a waiver) in order to issue a federal license. DEP also reviews the introduction of Chapter 37, but clarifies that it could not be made into law until the EPA approves the new water quality standard implicit in it, which EPA informed DEP that it would not do by letter in November 2003.

DEP next introduces a different spin on the repeated denials of first CMP's and then FPL's certification of the Project. DEP contends that since it knew the Project would not meet the Class C standards in the years 1996-2002, it encouraged FPL to withdraw its application to prevent its being rejected. DEP then recounts how the Commissioner's decision to certify excluded a reference to the disapproved Chapter 37, but used the rational [sic] behind that policy anyway. DEP thus finds the Commissioner's contention that she was merely reinterpreting existing standards, and not relying on the EPA-disapproved Chapter 37 standards to be disingenuous.

With regard to the standard of review, DEP asserts that FPL's reliance on the fact that the BEP is a lay board and thus should not be accorded deference in interpreting statutes is misplaced and also violates Law Court precedent. DEP cites its enabling legislation to bolster its assertion that the BEP has both the responsibility to hear appeals of the Commissioner's decisions and that in doing so, it may "adopt, modify, or reverse the findings of fact or conclusions of law established by the Commissioner." *See* 38 M.R.S.A. § 341-D(4)(A). In *Warren,* the Law Court specifically addressed the fact that a lay board is due deference, and that "The standard is whether the subject matter is beyond the scope of BEP expertise." 2005 ME 27, ¶ 6, 868 A.2d 210, 214. DEP states that BEP has the requisite experience and expertise in interpreting relevant statutes as evidenced by the appeal it considered in the *Warren* case.

DEP then refutes the argument that the NGOs lack standing by emphasizing that "aggrieved person" is broadly defined by departmental regulations, as including any individual, partnership, corporation, government entity, association or public or private organization of any character that the Board determines may suffer particularized injury as a result of a licensing or other decision. The DEP contends that the BEP had substantial evidence before it, including affidavits from members of the NGOs. indicating that the intervenors met that standard.

DEP then addresses FPL's contention that DEP waived certification because final agency action was

not completed within one year, per section 401 of the Clean Water Act. A portion of DEP's argument relies on a different interpretation of *Airport Communities Coalition v. Graves,* the Washington case that FPL relied upon in its brief, for the proposition that an agency cannot overturn its own decision outside of the one-year deadline. DEP contends that *Airport Communities* is more properly read to provide the federal agency with discretion to consider state agency decisions made outside of the one-year deadline. The remainder of DEP's argument in this section relies on the FERC decision specifically stricken from the record by this court, and thus subject to petitioner's separate motion to strike.[6] DEP maintains that the FERC decision dismisses FPL's arguments that an agency must act and decide any appeals relating to that action within a one-year deadline.[7]

DEP next invokes the Law Court's *Warren* decision in an effort to definitively refute FPL's contention that the Project can escape the need for certification. Until the Supreme Court ruled on the appeal, the Law Court's decision from earlier this

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[6] *See FPL Energy Maine Hydro LLC,* 108 F.E.R.C. ¶ 61261 (September 21, 2004), 2004 FERC LEXIS 1939, *rehearing denied* at 111 FERC ¶ 61104 (April 19, 2005), 2005 FERC LEXIS 1003.

[7] In its Response to FPL's Motion to Strike, the DEP contends that it relies on the FERC decision as persuasive legal authority, and not as part of the certified administrative record, from which the FERC decision was excluded by this court. Because the FERC decision is submitted as part of argument, the motion to strike must be denied.

year was controlling law on the matter, and the Law Court unanimously rejected FPL's arguments regarding the meaning of "discharge" and the relationship of that term to the certification process. *See S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 13, 868 A.2d 210, 216. Further, DEP emphasizes that Maine state law incorporates federal law by reference, the relevant federal law being that which requires states to certify water quality before federal hydropower licenses are issued. DEP thus properly participated in the certification process and it was necessary that it do so in order to comply with both state and federal regulations.

As for the anti-degredation policy, DEP agrees that some sort of balancing test is necessary to weigh the importance of the competing uses of in-stream water-sustaining aquatic life versus generating energy; that balancing test exists in the form of a UAA. DEP opines that a UAA may indeed determine that hydro energy generation should be prioritized over sustaining aquatic life, but until the proper analysis is performed, the anti-degredation policy does not in and of itself require certification, or prioritize the energy-related use.

Finally, DEP argues that the Project does not meet applicable water quality standards as a matter of law. Focusing again on the term "discharge," DEP takes issue with FPL's relying on a definition of the term that necessitates pollutants to be present for there to be a discharge. As the Project does not involve pollutants, so FPL argues, there is no discharge, so it

should be exempt from the certification process. But as DEP points out, depleting 95% of a reservoir in order to generate energy substantially degrades the water quality whether or not pollutants or a discharge are involved. By enacting water quality standards, it was the Maine's legislature's intent to "restore and maintain the chemical, physical, and biological integrity of the State's waters and to preserve certain pristine state waters." *See* 38 M.R.S.A. § 464(1). The DEP maintains that the major depletion of the reservoir involved in the Project does not maintain the "integrity" of the body of water and thus frustrates the legislative intent behind Maine's water classification scheme. Further, DEP notes that there would not have been a need to introduce Chapter 37, which attempted to relax the water quality standard for impoundments, if some type of water quality standards did not apply to impoundments in the first place.

Petitioner's Reply Brief

With regard to the standard of review, FPL repeats its argument from its petition, agreeing with the need for the BEP to have expertise in environmental statutory interpretation, but then contending that a lay board could not possibly have such expertise. But the case FPL cites to support this proposition, *Isis Dev., LLC v. Town of Wells,* concerns a local zoning board, not the BEP, which is charged with and has experience in interpreting a complex regulatory

and statutory scheme. *See* 2003 ME 149, ¶ 3, n. 4, 836 A.2d 1285.

As for the NGOs lacking standing, FPL dismisses the significance of the organization members' affidavits, which attest to their personally fishing, canoeing, and hunting waterfowl in the waterways affected by the Project. FPL maintains that its proposed operation of the Project will not affect these activities, and thus without a "particularized injury" the NGOs had no standing to file their appeal, and it should be dismissed.

The thrust of the petitioner's reply hones in on the interpretation of "discharge," emphasizing that it is only hydroelectric facilities that discharge pollutants that are subject to certification; as FPL does not discharge pollutants, it should be exempt from the process. FPL also reviews the legislative history and intent behind the appropriate water quality standard that should apply to the Project, fine-tuning in detail the arguments it made in its petition.

An angle that was relegated to footnotes in the initial briefs, but is given some prominence in the reply is the notion of whether a denial of certification would result in an unconstitutional taking of the Project from FPL. It is worth noting that the BEP's denial of certification was without prejudice, however, and allows for a UAA to determine the appropriate water quality standards to apply to the Project. Only then will a final determination be made as to whether the Project can be operational. Though FPL urges the

court to interpret statutes to avoid an unconstitutional result (a taking), the BEP's decision does not end the process of certification, but extends that process out to include a UAA.

The court is satisfied the intervenors or NGOs have standing. While standing is a question of law, the issue is factually driven. The court accepts the BEP determination of their qualification as intervenors based upon its findings of fact.

The court is satisfied that *Airport Communities Coalition v. Graves* stands for the proposition that the federal agencies are not bound by the decisions when the state "fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request" by decisions issued beyond the one-year limitation. 280 F.Supp.2nd at 1217; 33 U.S.C. § 1341(a)(1). The court finds no jurisdictional implications for state action affecting the final agency action of the DEP.

The petitioner asserts that the so-called Chapter 37 Resolve does not change the class C water quality classification and therefore it may rely upon the 1993 EPA water quality standards and no further approval by the EPA is necessary. The DEP posits that to the extent the resolve attempts to change a "natural lake" standard to a "impoundment to impoundment" standard, it is a change in the water quality standard requiring EPA approval. It appears to the court that whether or not it is a change of standard is a

technical decision based upon the facts of the science, clearly a matter within the expertise of the agency and not subject to decision by this court based upon the evidence put before it. This deference requires the court to reject the argument of petitioner to overturn the agency action based upon the resolve. The court particularly notes the position of the BEP suggesting that the DEP either obtain EPA approval of the Chapter 37 water quality standard or conduct a UAA to recalibrate the water quality standards for water storage reservoirs. This court infers that such a policy statement by the BEP would prevail in the future actions of the DEP.

The remaining and most substantive issue before this court is whether or not the certification in question is required under the federal Water Quality Act based upon a jurisdictional requirement of the existence of a "discharge" and whether the facts of this case give rise to the existence of a "pollutant" as defined in that law. The thrust of FPL's arguments were disposed of by the Law Court in *Warren,* and the affirming decision of the U.S. Supreme Court is controlling. The Project releases a "discharge" and is thus subject to existing water quality standards, which were justly interpreted by the BEP to deny certification to FPL for the Project.

The entry will be:

> Petitioner's motion to strike respondent's extra-record materials referenced in and attached to intervenor's and respondent's brief

is DENIED; the Board of Environmental Protection Order granting appeal and denying water quality certification dated July 15, 2004, in the matter of FPL Energy Maine Hydro, LLC is AFFIRMED.

Dated: May 25, 2006 /s/ Donald H. Marden
Donald H. Marden
Justice, Superior Court

STATUTORY PROVISION INVOLVED

The issue presented involves interpretation of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251 *et seq.*, specifically Section 401 of that Act, 33 U.S.C. § 1341. The pertinent text from Section 401 follows.

Clean Water Act

33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title,

the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply

with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.